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Fugitive Justice: Slavery and the Law in Pre-Civil War America

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STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL. Belknap Press of Harvard University Press, 2010. 367 pp. $29.95.

The seeds for the Civil War were first planted at the Constitutional Convention in Philadelphia in 1787 according to Northwestern University Law Professor Steven Lubet, in his new book, *Fugitive Justice*. Lubet provides detailed accounts of important trials and of the persecution of a judge after a controversial ruling, as well as the historical context necessary for the reader to better understand this volatile period in American history.

The first chapter, "Slavery and the Constitution," demonstrates that slavery became a topic of debate when attempting to determine the size of the House of Representatives. Were they to measure a state's size based on the number of "free" inhabitants or on property value? And if so, should slaves be counted as property? The Southern delegates made it clear that slaves would have to be counted for an agreement to be reached. The North felt that giving the Southern states more delegates because of their slaves rewarded the abhorrent practice of slavery. In addition, they argued, if they were going to be counted for representation, why not make them citizens and give them the right to vote? A compromise was drafted by James Wilson of Pennsylvania, a well-known opponent of slavery, and Charles Cotesworth Pinckney of South Carolina, a bold defender of slavery. Known as the Wilson-Pickney proposal, it eventually became the three-fifths provision, counting three-fifths of the population of slaves for enumeration purposes.

The slaveholders were not finished, however. They felt it was important that they be able to apprehend fugitive slaves in the North as criminals. Without much debate, a final slavery-favoring provision was added:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due. (Article IV, Section 2, U.S. Constitution, later superseded by Amendment XIII.)

Known as the Fugitive Slave Clause, its adoption was viewed as necessary by the South, according to Lubet, as a direct result of *Somerset v. Stewart*, 98 E.R. 499 (K.B. 1772), a 1772 British decision. James Somerset, a Virginia slave, was taken to England by his owner, Charles Stewart. Somerset escaped, but was recaptured and placed on a slave ship headed for Jamaica. There was no doubt that Somerset was a slave under the laws of Virginia. However, there was no comparable English statute authorizing slavery. A group of British abolitionists became familiar with Somerset's predicament and filed a writ of habeas corpus on his behalf. The English court had to decide which law would govern Somerset's status. Lord Mansfield's decision was clear: slavery was morally and politically wrong and nothing should be done to support it. A slave's status does not follow him from place to place. Therefore, he reasoned, if there is no specific statute to the contrary, a slave becomes a free man once he steps foot on free soil.

Although the decision was limited to England, it concerned the Southern slave owners enough that they felt they needed constitutional protection from such a rule in the new United States. Many, including Lubet, believe that had it not been for the Three-Fifths Compromise and the Fugitive Slave Clause, there would be no United States of America.

Almost immediately, conflicts arose between states. Several Northern states viewed attempts to capture runaway slaves as "kidnapping" and refused to adhere to the Fugitive Slave Clause. In response, Congress enacted the Fugitive Slave Act of 1793. It passed with no opposition in the Senate and an overwhelming majority in the House. The Act allowed slaveholders to seize and arrest runaways and take them before a federal judge or magistrate. If the slaveholder was able to establish that the person was in fact a runaway slave, the judge had a duty to give the slaveholder a certificate authorizing the slave's return to the person from which he or she fled. Another portion of the Act made it a crime to obstruct or hinder a slave's capture or to conceal a runaway. Passage of the Act was seen as an attempt to placate the Southern states and keep this fragile union born in Philadelphia in place.

As more states entered the Union, Lubet illustrates, new conflicts arose as the political gulf between free states and slave states widened. Within the next 10 years the lines of demarcation became clear with all of the original Northern states having either abolished slavery or established gradual emancipation. Any new states created in the Northern Territories would have to prohibit slavery. At the same time, slavery was flourishing in the South, expanding from 650,000 Southern slaves in 1790 to over four million by 1860. When a new state sought to enter the Union, much debate ensued regarding the balance of power between slave states and free states. Free states gradually started adopting laws to prevent the kidnapping of "free people of color" and providing criminal penalties for wrongful enslavement. The fear was that in their zeal to capture and return runaways, slave "catchers" were kidnapping free blacks. These statutes made it increasingly difficult for masters to reclaim their slaves. Enter *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), in which the U.S. Supreme Court held that the Fugitive Slave Act of 1793 was self-executing and independent of any state regulation. Every slaveholder had a positive right to recapture his slaves anywhere in the Union without being impeded by local laws. The power to legislate for the recovery of fugitives belonged exclusively to Congress, as Justice Storey wrote.

Since *Prigg* found that fugitive slave catching was exclusively a federal duty, free states began adopting laws prohibiting the involvement of their courts, sheriffs, or even use of their jails for rendition of fugitives. This again made life difficult for the slaveholders because there were limited federal officials and virtually no federal jails at the time. Southerners were becoming more and more disillusioned with the North's obvious intent to sabotage their efforts whenever possible, in clear violation of the compromises that convinced them to become a part of the United States to begin with. Staunch revolutionary patriots like Daniel Webster jumped to the defense of the South and chastised the Northern states for reneging on their promises. By 1850, Congress was forced to amend the Fugitive Slave Act to beef up the exclusive federal authority and make fugitive slave rendition as simple as possible. Not only did it provide very little due process for the fugitive, it put stiff penalties in place for hindering the process in any way, including use of state courts to protect fugitives. It allowed federal marshals to call upon any bystander to help and imposed penalties if they refused, including the right of the slaveholder to sue obstructionists civilly for the value of the "lost" slave.

Though the Compromise of 1850 "seemed to be working," as Lubet writes, "tensions reemerged with the eruption of the Kansas-Nebraska controversy." The Kansas-Nebraska Act was signed into law in 1854, allowing all questions pertaining to slavery in the Territories to be left to the people residing therein. This was viewed as a repeal of the Missouri Compromise, which had set a demarcation line between North and South, slave and free states. Northerners felt that if Southerners did not have to comply with the agreed-upon "boundary," they should not have to adhere to the Fugitive Slave Act.

The next 10 years saw several notorious Fugitive Slave Act cases in which Northern sympathizers rescued captured slaves and were then tried with violations of the Act and even treason. Capturing slaves in the North, particularly the Boston area, became an extremely dangerous proposition resulting in the deaths of both slave catchers and slave rescuers.

Lubet presents detailed accounts of three such trials. He includes fascinating background information about the attorneys involved and trial strategy, and he even provides excerpts from trial transcripts. At a time when opening and closing statements could wind on for days and parties to the proceeding were not allowed to testify, Lubet has painted a picture of the trials of interest to both lawyers and historians. Arguments involving "god's law v. man's law," whether an "unjust" law can bind anyone, and whether it is acceptable to violate one law to enforce another make these trials relevant 150 years later. Each trial brings clarity to the reasons that the South felt pushed to secession: the Union had not lived up to its promises.

Judges will be particularly interested in some of the ethical issues faced by judges who sympathized with the abolitionists, but at the same time were bound to uphold the law. Of particular interest is the chapter titled "Judge Loring's Predicament" (p. 207). Edward Greely Loring was a part-time federal "Fugitive Slave Commissioner" charged with reviewing warrants for the arrest of fugitive slaves in Massachusetts (an abolitionist stronghold) and presiding over their rendition hearings. Loring was also a Probate Judge for Suffolk County, Massachusetts, and a faculty member at Harvard Law School. He was a highly respected legal scholar. He found himself in the position to rule on the rendition of Anthony Burns. Lubet sets out the details of the trial, which resulted in Commissioner Loring issuing a certificate allowing Anthony Burns's owner to remove him from Massachusetts and return with him to Virginia.

Loring became a pariah in Boston. He was hung in effigy, accosted by strangers on the street, and shunned by colleagues. There was even talk of having him tarred and feathered. Harvard chose not to renew his teaching contract. A campaign was initiated to oust him as Suffolk County Probate Judge. The Legislature conducted hearings in response to petitions filed for his ouster for being a "slave commissioner." He filed a response stating that he had done nothing more than discharge his "painful duty" to apply the Fugitive Slave Act to the case before him, a law which had been held constitutional by the Massachusetts Supreme Court. Surprisingly, Richard Henry Dana, the attorney who had represented Anthony Burns, ended up being his most eloquent defender. Although he argued that Loring had decided the case in error and showed little humanity, he had not done so because of misconduct or corruption. He pointed out that the public was better served when judges were protected from the powers of the two other branches of government, even when they make mistakes. "We must do justice even to our enemies," he argued (p. 224 n. 38).

Notwithstanding these arguments, the Legislature voted to remove him from office. However, the Governor was required to assent to make it final. Massachusetts Governor Henry Joseph Gardner was elected on an anti-slavery platform. He shocked everyone when he refused to assent in the action. In a statement that will warm the hearts of judges everywhere, he said:

> It may be pertinent to ask what the duty of judges is. Are they to expound the laws as made by the law-making power; or are they to construe them in accordance with popular sentiment? When the time arrives that a judge so violates his oath of office as to shape his decisions according to the fluctuations of popular feeling, we become a government, not of laws, but of men (p. 225 n. 40).

Unfortunately, three years later when a new, less sympathetic Governor took office, Judge Loring was removed from office.

Lubet's book is an interesting analysis of the importance of the Fugitive Slave Acts in the years leading up to the Civil War and the role the attorneys and judges of the time played in using it as a platform to shape the debate over slavery. The trial discussions remain relevant to today's legal practice and Judge Loring's story illustrates the continued need for judicial independence, especially when in opposition to popular politics.

Karen Arnold-Burger joined the Kansas Court of Appeals in March 2011 after serving since 1991 as a municipal judge in Overland Park, Kansas. She serves on the executive board of the National Conference of Special Court Judges, which is part of the American Bar Association's Judicial Division, and previously served as president of the Kansas Municipal Judges Association. She has been an adjunct faculty member at the National Judicial College since 2000. Arnold-Burger received her J.D. from the University of Kansas in 1981.